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Supreme Court, U.S.
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No. 04-1397

IN THE

Supreme Court of the United States

EDWARD GERBER, JESSE VALADEZ, AND FRED LAWRENCE,

Petitioners,

v.

EMMANUEL SENYO AGYEMAN,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONERS' REPLY BRIEF

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INTRODUCTION

Respondent errs in claiming that certiorari is unnecessary because all circuits apply essentially the same test under 28 U.S.C. § 1915(e)(1). The circuits apply different standards, the consequence of which is to shift scarce legal resources from those most needy to those most litigious—like Agyeman. This anomaly cries out for this Court's guidance. Further, the Ninth Circuit's opinion in this case was not "confined to an unusual set of facts." Respondent's chimerical portrayal of himself as an "innocent" victim "trapped" in isolation for simply using profanity is flatly contradicted by his own admissions, history of litigation and horrific disciplinary record. He engages in this subterfuge in order to persuade this Court, as he did the Ninth Circuit, that he was unable to act as his own advocate. The record belies the notion.

Agyeman sets unwise precedent that will encourage virtually every inmate or detainee in any prison around the country to claim that a mere lack of legal training entitles them to free legal counsel. Certiorari is needed to provide guidance on whether Congress or this Court intended 28 U.S.C. § 1915(e)(1) to apply to indigent plaintiffs like Respondent—literate, articulate and experienced in litigating straightforward claims.

ARGUMENT

I. CONTRARY TO RESPONDENT'S CLAIM, THE FEDERAL CIRCUITS *ARE* SPLIT ON THE STANDARD AND DEGREE OF DISCRETION DISTRICT COURTS MAY USE IN DETERMINING REQUESTS FOR COUNSEL

The only reason this Court has passed up two prior opportunities to set a uniform standard for evaluating requests under 28 U.S.C. § 1915(e)(1) is that neither prior case presented the significant concerns at issue here. *See Tabron v. Grace,* 6 F.3d 147 (3rd Cir. 1993), *cert. denied*, 510 U.S. 1196 (1994), and

Farmer v. Haas, 990 F.2d 319 (7th Cir. 1993), *cert. denied*, 510 U.S. 963 (1993).[1] Both cases involved uneducated inmates inexperienced in litigation. Both inmates lost at the summary judgment stage (later reversed in *Farmer*), which demonstrated their lack of experience relative to the complexity of their cases. Even on the surface, both appeared to involve meritorious claims. *See Tabron* (failure to protect from reasonably foreseeable attack by fellow inmate) and *Farmer* (failure to provide treatment for inmate's undisputed condition of transsexualism). Under any circuit's test, those inmates warranted appointment of counsel. In contrast, this case (appointing counsel to a sophisticated litigant with straightforward, non-meritorious claims who succeeded in getting them to trial) illustrates the boundlessness of the test adopted by the Ninth Circuit in *Agyeman*.

Respondent goes to great lengths to make it appear as though all circuits apply a harmonious standard under 28 U.S.C. § 1915(e)(1). He maintains that the same legal principle guides every district court's discretion—whether denial of counsel would deny the plaintiff due process. This does not mean, however, that the courts' analyses or results are consistent. In truth, the lack of a uniform standard results in a system that thwarts the very principle supposedly guiding these decisions. And while most circuits do assess the "core" similarities that Respondent identifies (complexity of the case relative to the inmate's ability to represent himself and merits of the claim), the factors utilized and the degree of deference exercised varies dramatically from circuit to circuit. The Third Circuit expressly rejected what it called the "limitation" of the "exceptional circumstances" test as "not supported" by § 1915(e)(1). *Tabron*, 6 F.3d at 150. Even the "seminal"

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[1] In *Tabron*, the Third Circuit rejected the "exceptional circumstances" test. 6 F.3d at 155. *Farmer* opted for a "stripped-down" alternative to the Seventh Circuit's multi-factor test in *Maclin v. Freake*, 650 F.2d 885, 887 (7th Cir. 1981).

case Respondent cites recognized that "there are few hard and fast rules governing appointment of counsel" under section 1915(e)(1). *Maclin*, 650 F.2d at 887.

Certain circuits use a broad approach, giving the district courts broad discretion in applying enumerated factors. This sharply contrasts with the mandate of other circuits that counsel may be appointed only in "exceptional circumstances." *Compare Maclin*, 650 F.2d at 887-88, and *Hodge v. Police Officers*, 802 F.2d 58, 61 (2nd Cir.1986), *with Cook v. Bounds*, 518 F.2d 779, 780 (4th Cir. 1975); *Lavado v. Keohane*, 992 F.2d 601, 605-06 (6th Cir.1993), and *Aldabe v. Aldabe*, 616 F.2d 1089, 1093 (9th Cir.1980). Still others call their standard "exceptional circumstances," but apply a multiple factor analysis. *E.g., DesRosiers v. Moran*, 949 F.2d 15 (1st Cir. 1991); *Cox v. Mitchell*, 2004 WL 2545034 (N.D.Tex. 2004). Far from demonstrating their "core similarity," these cases highlight the circuits' dissimilar tests, which produce divergent results for similarly situated plaintiffs.

Respondent claims that virtually every one of Petitioners' cases "cite[s] to, and adopt[s] factors from *Maclin*," which he claims "underscores that the factors are indistinguishable in principle." To the contrary, none of Petitioners' Fourth, Sixth or Ninth Circuit cases cites to *Maclin* or its analysis. *See, e.g., Cook*, 518 F.2d 779; *Lavado*, 992 F.2d 601; *Aldabe*, 616 F.2d 1089; *Whisenant v. Yuam*, 739 F.2d 160 (4th Cir. 1984); *Strickler v. Waters*, 989 F.2d 1375 (4th Cir. 1993); *Liggins v. Rivas*, 990 F.2d 1258 (9th Cir. 1993).[2] Respondent also cites *U.S. v. 30.64 Acres of Land*, 795 F.2d 796, 800 (9th Cir.

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[2] The one case Respondent claims to not rely on *Maclin* actually does so. *See Poindexter v. F.B.I.*, 737 F.2d 1173, 1189 (D.C. Cir. 1984). Moreover, Petitioners did not cite *Poindexter* and the other cases at pp. 16-17 as examples of circuits that diverge from a *Maclin*-type multiple factor test. Those cases were cited to show that even circuits giving trial courts broad discretion under a multiple factor test vary as to what factors should be considered.

1986), for the proposition that the Ninth Circuit affords "considerable discretion" to district courts in determining whether counsel should be appointed. But *30.64 Acres* presented a different question—whether the district court had the ***authority*** to appoint counsel in an eminent domain action. After holding that it did, the court emphasized that while district courts have considerable discretion, grants of counsel should be rare and are only appropriate where "exceptional circumstances" exist. *30.64 Acres*, 795 F.2d at 799-800. This reinforces Petitioners' point that discretion to appoint counsel is much broader in the Second, Third and Seventh Circuits, where district courts are not bound by the "exceptional circumstances" limitation. *See also Farmer,* 900 F.2d at 323 (Seventh Circuit shall only override district court's discretion in appointing counsel in "extreme cases").

Adopting a uniform standard would not "inevitably detract" from the courts' ability to respond to individual circumstances, as Respondent argues. Allowing *Agyeman* to stand will inevitably result in the increased frequency of appointed counsel to "jailhouse lawyers" at the expense of those litigants who truly cannot effectively articulate themselves or handle their own representation. Clear guidance from this Court on the standard and its proper application would further the intent of Congress and this Court in assuring that indigents who ***truly*** need an attorney in a civil case will have one. Thus, rather than being "rigid," a uniform standard would produce the fairest results under 28 U.S.C. § 1915(e)(1) and enhance due process protections for those most in need.

II. RESPONDENT IS NOT ENTITLED TO APPOINTED COUNSEL UNDER ANY CIRCUIT'S STANDARD

A. The record does not support Respondent's claim that he was entitled to appointed counsel because he was an "innocent" detainee "trapped" in isolation and unable to effectively represent himself.

Respondent makes numerous inaccurate "factual" assertions upon which he bases his analysis under the "exceptional circumstances" test. For example, in an ongoing portrayal of himself as an "innocent" detainee, Respondent criticizes Petitioners' statement that he was incarcerated as a result of a DUI or for passing a bad check. Yet Agyeman himself so testified at trial. (TR 4/22/03 at 129:23-130:23, TR 4/23/03 at 238:3-18, TR 4/23/02 at 237:10-13). Respondent also presents an inaccurate ugly image of his confinement in CCA, claiming he was treated "as if he had been a convicted killer," "kept in solitary confinement, shackled in leg irons and chest chains, and . . . subjected to physical abuse by guards." (Rsp. Br. at 4). This pathetic description of Respondent's alleged conditions of confinement is notably absent from the lower courts' briefing, record and decisions. The only truthful fact Respondent has proffered is that he was often segregated—a fact the jury found was the result of Respondent's incessantly aggressive, defiant behavior.[3]

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[3] In addition to the disciplinary problems listed in the Petition, these included refusing to mop the floor, saying "I'll mop what I want to mop"; refusing to show the chaplain a pass, stating, "why should I" and "what the hell kind of chaplain are you anyway? You're just full of shit"; refusing to comply with an order to move to another cell so he could have the bottom bunk he requested; refusing to make his bed, saying, "why do I have to make my bed?" and that the prison rules are "bullshit"; threatening an officer to "watch your ass" for telling him to finish his phone conversation because lunch was ready; throwing a cup of water at

Respondent also accuses Petitioners of "misrepresenting the record" in stating that he only asked for counsel once before trial. Yet Respondent never provides a date or any proof of a request other than the one noted by both the district court (App. 7a) and the Ninth Circuit (App. 3a) on August 24, 2000. Respondent then claims that Petitioners are "misleading" when they state that his lack of law library access was rectified once he transferred out of the Maricopa County Jail two and a half years before trial. Yet the record shows that the ***only time*** Respondent complained of no library was during his three month stay at that jail. Although Respondent **now** complains he had no library access, he never complained so or renewed his request for counsel at any point over the next three years. Moreover, his argument misrelies on *Casey v. Lewis*, 834 F.Supp. 1553, 1556-57 (D.Ariz. 1992), which discussed lack of library access in Arizona's ***state*** prisons, not the private CCA facility at issue.[4] Unlike Arizona's state prisons, CCA has law libraries on site and personnel to assist with research and preparation. Inmates in segregation have access to the library through the librarian

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the wall next to an officer and telling him to "mind his own damn business" when that officer overheard him making threats about another officer; becoming combative and difficult to control during an escort, telling an officer to "get your fucking hands off me"; refusing to walk from van to hospital, stating, "I need a fucking wheelchair. I'm not walking no fucking where"; refusing to clean his cell, telling the officers to clean it themselves; throwing Kool-Aid and water on his cell floor, blocking the door with his body and telling an officer to "get out of here" when told to move to the back of the cell because he was getting a cell-mate; telling an officer who asked how he was doing to "Piss off. I'm tired of talking to assholes"; and injuring an officer who was attempting to handcuff him. These examples demonstrate a serious ongoing disciplinary problem requiring segregation from other inmates and officers—not simply a problem with profanity.

[4] Furthermore, this Court reversed *Casey* and held that governmental entities, including prisons, have no affirmative obligation to provide law libraries. *Lewis v. Casey*, 518 U.S. 343 (1996).

who brings them whatever materials they need. Frankly, Respondent's numerous pleadings containing legal citations and his success in bringing his claims to trial render this *post hoc* claim incredible.

Respondent also accuses Petitioners of "dramatically overstat[ing] Respondent's legal prowess," claiming that most of his 18 lawsuits relate to this case. The record, which does not show *any* duplicative lawsuits, belies that assertion. Finally, the "host of other impediments" Respondent claims are either not supported by the record, not reflected in the actual course of litigation, or were addressed by the District Court prior to or during trial. The Magistrate issued separate orders regarding the Respondent's "lost" legal papers and his desire to depose his opponents. (App. 10a).

B. Respondent is a literate, educated plaintiff capable of effectively articulating his claims, which were simply not complex.

Respondent cites no case holding it an abuse of discretion to deny counsel to a plaintiff who, like himself, is literate, educated, and able to articulate a straightforward claim. Instead, he asserts that Petitioners' cases are inapposite because they involve convicted prisoners, whereas Respondent's status was purely "civil." Petitioners can find no such distinction in the caselaw.[5] Further, that none of Petitioners' cases involves a *Bivens* issue—one of the Ninth Circuit's "complexities"—is a red herring. *Bivens* and §1983 actions are analogous, and

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[5] A number of cases denying requests under 28 U.S.C. § 1915(e)(1) do not involve convicted inmates. *E.g., Gorenc v. Salt River Project Agricultural Improv. & Power Dist.*, 869 F.2d 503 (9th Cir. 1989) (irrigation district employee suing employer); *Richards v. Harper*, 864 F.2d 85 (9th Cir. 1988) (citizen suing legislators); *Aldabe*, 616 F.2d 1089 (9th Cir. 1980) (divorced woman suing ex-husband, purchasers of marital property and various judges); *Hudak v. Curators of Univ. of Missouri*, 586 F.2d 105 (8th Cir. 1978)(former assistant professor suing university officials).

Petitioners never raised this technicality. The Ninth Circuit's other two "complexities" are equally flawed. That Respondent theoretically could have added the United States as a defendant or that, in the Ninth Circuit's view, he did not properly frame a non-issue, are not proper grounds for appointing counsel under *any* case from *any* circuit.

Petitioners cited numerous excessive force cases that were found to be straightforward and not deserving of appointed counsel. Instead of addressing these cases, Respondent conclusorily remarks that Petitioners rely on nothing but "rank speculation." It is inconceivable under what logic a circuit court would find this excessive force case too "complex" for a literate, educated plaintiff like Agyeman to litigate. Nor does the "credibility factor" distinguish Petitioners' cases, as Respondent argues. The courts in those cases only noted that relative to the inmates' abilities and the claims' minimal complexity, the credibility issues did not warrant appointment of counsel. That is entirely consistent with the Magistrate's ruling here.

As shown in the Petition, Respondent—literate, educated, and able to effectively present his claims—simply does not present the type of civil litigant for whom counsel should be appointed under 28 U.S.C. §1915(e)(1). Courts generally find abuse of discretion where counsel is denied to plaintiffs with physical or mental impairment, or limited English proficiency. Even *Maclin*, the "seminal" case cited by Respondent, involved a paraplegic "confined to a wheelchair and in constant pain, [who] can hardly be thought capable of conducting an adequate examination of his own medical records, let alone of developing evidence of the medical treatment he ought to have received." 650 F.2d at 889. *Maclin* had no "workable knowledge of the legal process," and his "lack of familiarity with legal procedures" resulted in premature dismissal of his claim. *Id.* No such facts appear in this record.

III. THE NINTH CIRCUIT'S OPINION SETS A DANGEROUS PRECEDENT REQUIRING APPOINTMENT OF COUNSEL IN VIRTUALLY EVERY CIVIL LAWSUIT BROUGHT BY AN INDIGENT INMATE OR DETAINEE

Respondent's ultimate argument is that he was under an "insurmountable disadvantage" because he was "left to try the case unassisted against opponents represented by one of the most experienced litigation firms in Arizona [with] unmatched trial and appellate experience.'" (Rsp. Br. at 6). This "David versus Goliath" characterization reinforces Petitioners' argument by revealing Respondent's true aims: to expand the standard for appointing counsel so that it is required in ***every*** lawsuit in which an indigent inmate or detainee—who by definition will never have any legal training—faces an opponent represented by counsel. This is not the proper standard for appointment of counsel in civil lawsuits. As Judge Posner poignantly expressed:

> No doubt a good lawyer would have done better than Farmer, and might have won; but if this were the test, district judges would be required to request counsel for every indigent litigant. . . . The statute confides the matter to the district judge's discretion, ***which we shall override only in that extreme case in which it should have been plain beyond doubt before the trial began that the difficulty of the issues relative to the capabilities of the litigant would make it impossible for him to obtain any sort of justice without the aid of a lawyer . . .***

Farmer, 990 F.2d at 323 (emphasis added). Even a cursory review of this record shows that this case comes nowhere close to this standard.

Respondent's attempt to minimize the likely impact of the *Agyeman* opinion is naive. If Respondent is entitled to free representation for his civil lawsuit, then most of the in-

carcerated or detained population in this country will likewise be entitled. Unless this Court grants certiorari and defines a clear, uniform standard, *Agyeman* will undoubtedly unleash a bounty of requests and orders for appointment of counsel. This dangerous precedent will shift scarce legal resources from those inmates or detainees who need them most to those like Agyeman who are simply the most litigious.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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